No. 92-1946

In The

Supreme Court of the United States

October Term, 1993

WARD PETROLEUM CORPORATION, et al.,

Petitioners,

vs.

THE OKLAHOMA CORPORATION COMMISSION, et al.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Oklahoma – Division III – MacFarlane Company And Trimble Properties

BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

Respondents MacFarlane Company and Trimble Properties have no parent companies and have no corporate subsidiaries which are not wholly owned.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA – DIVISION III

Respondents MacFarlane Company and Trimble Properties respectfully request that this Honorable Court deny the Petitioners' request for a Writ of Certiorari to the Oklahoma Court of Appeals. The Petitioners were not denied due process. Further, Petitioners' claims are barred by the doctrine of res judicata.

OPINIONS BELOW

See Petitioners' Appendix at APP 5 – APP 10 for the Oklahoma Court of Appeals Opinion and APP 11 – APP 61 for the Order of the Oklahoma Corporation Commission.

SUMMARY OF REASONS FOR DENYING PETITIONERS' REQUEST

As can be seen from Petitioners' Brief, the history of this dispute is long. The particular Petition for Writ of Certiorari presently before the Court emanates from an application filed by Petitioners at the Oklahoma Corporation Commission. Petitioners seek to vacate a 1984 pooling order or, in the alternative, to reopen the Oklahoma Corporation Cause resulting in the 1984 pooling order. The Order which Petitioners seek to vacate force pooled Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

Below, Petitioners claimed entitlement to the requested relief based on a contention that the notice relating to the 1984 pooling order was inadequate. Petitioners then claimed that because of the alleged inadequate notice, they were denied an opportunity to make a properly informed election under the pooling order.

As will be discussed below, the Petition for Writ of Certiorari to the Oklahoma Court of Appeals should be denied because: (1) the notice of the 1984 pooling proceeding was adequate; and (2) the doctrine of res judicata applies and prevents relitigation of the same issues presented in *Inexco Oil Co. v. Corporation Commission*, 767 P.2d 404 (Okla. 1988), *cert. denied*, 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989). The Oklahoma Court of Appeals did not decide a federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals. The Oklahoma Court of Appeals did not decide an important question of federal law which has not been, but should be, settled by this Court. The Oklahoma Court of Appeals did not decide a federal question in a way that conflicts with applicable decisions of this Court.

CORRECTION TO AND COMPLETION OF PETITIONERS' STATEMENT OF THE CASE

Petitioners contend that Oklahoma Corporation Commission Order No. 260474, the 1984 pooling order, should be vacated "on the basis of misleading and erroneous notice". Petitioners refer to Commission Policy Statement No. 45 as the Commission's "third notice in

Cause CD No. 108567." (See Petitioners' Brief at p. 10). This is incorrect. Policy Statement No. 45 was not notice in Cause No. CD No. 108567, the cause out of which the 1984 pooling order emanated. Policy Statement No. 45 was not even a part of the record in the pooling proceedings. Policy Statement No. 45 was issued without any formal procedure with respect to a hearing or a notice of hearing. Policy Statement No. 45 was issued May 3, 1984, thirteen days after the hearing on the merits of the 1984 pooling application.

At page 13 of their Brief, Petitioners state that Petitioner, Ward Petroleum Corporation, obtained orders from the Commission allowing the drilling of an increased density well at an off-pattern location. The Orders Petitioners refer to at page 13 of their Brief, however, granted separate applications of both Respondent Inexco and Petitioner Ward. The applications had been consolidated for hearing. Both parties were named operator, with the ultimate operator to be determined by a second pooling proceeding.

As Petitioners state, Ward "sought another pooling order of the Commission, allowing it an election to participate in the increased density well". Ward's application was an attempt to repool Section 23, *i.e.* modify the Order from the 1984 pooling proceeding. The hearing of the second pooling proceeding, which authorized the drilling of the increased density well, was not conducted before the Corporation Commission Hearing Officer until March 1, 1985. Order No. 277146 was entered in the combined causes, allowing Petitioner Ward to not only participate in the increased density well, but to also operate it.

Inexco, however, appealed Order 277146. The Oklahoma Supreme Court, on appeal, reversed the Corporation Commission's order allowing Ward to participate in the increased density well. *Inexco v. Corporation Commission*, 767 P.2d 404 (Okla. 1988), *cert. denied*, 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989).

Specifically, the Oklahoma Supreme Court held:

> By accepting the bonus, Ward assigned its exploratory rights to Inexco, the operator and can assert no right to participate in the subsequent increased density wells. *Inexco*, 767 P.2d at 405.

Petitioners in this matter then petitioned this Court for a Writ of Certiorari to the Oklahoma Supreme Court. In that Petition, the Petitioners argued:

> "The First Order – together with Policy Statement No. 45 – gave clear notice to Petitioners that the First Order had only a well-bore scope, so that an election not to participate would *not* prejudice Petitioners' ability to exploit their leasehold through participation in later wells to be drilled in the unit. Acting on this notice, Petitioners made an opt-out election under the First Order. (R. at 70 – Exhibit No. 85).

The Petition for Writ of Certiorari was denied in the cause styled in this Court as *Ward Petroleum Corporation v. Louisianna Land and Exploration Company*, 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989)

Notwithstanding this Court's denial of the Petition for Writ of Certiorari, Petitioners filed the application which is the subject of this appeal, raising the same arguments raised in the second pooling proceeding, *i.e.*

the proceeding from which *Inexco* emanated. After five days of hearings, the Administrative Law Judge, in a 34 page, very detailed report, rejected each of Appellants' arguments. She reported in her Conclusions:

> "2. The application is subject to res judicata and collateral estoppel and therefore should be denied. A complete reading of the documents presented within Exhibit 85 reveals that they are not merely a blueprint for the application presented in this cause but are identical in their presentation of issues, and almost in the words used. The parties thus had a full and fair opportunity to present these arguments and issues before the Oklahoma Corporation Commission, the Oklahoma Supreme Court, and the U.S. Supreme Court. These arguments and issues were considered and were denied by the Oklahoma Supreme Court and the U.S. Supreme Court. While the denial of these arguments and issues may appear to be harsh and unfair to the applicant and supporting parties, the Oklahoma Supreme Court (and U.S. Supreme Court), apparently, disagreed. The Oklahoma Supreme Court reviewed the entire situation, including the extreme results which could occur if the first order was termed to be a unit order with no amendments permitted, and determined that the proper decision was the one it made. To grant the present application in any manner or form would be a direct repudiation and disregard of the Oklahoma Supreme Court's decision in *Inexco Oil Co. v. Oklahoma Corp. Com'n*, 767 P.2d 404 (Okla. 1988).

* * *

> "A reading of each of the pleadings in Exhibit 85 shows a zealous representation was made to the Oklahoma Supreme Court of the very same issues which were presented to the Commission in the present application. It most definitely cannot be said that the parties were not given a full and fair opportunity to argue and did not accept and use the opportunity to argue all sides of the pooling question. Thus, each of the issues raised in the present application was raised and fairly and fully litigated before the Court, which made a decision, apparently, based upon the arguments presented in the initial appeal and in the subsequent pleadings, therefore res judicata and collateral estoppel apply."

On appeal from the Initial Report of the Administrative Law Judge, Petitioners renewed their same arguments. The Appellate Administrative Law Judge affirmed the recommendations contained in the Initial Report of the Administrative Law Judge with the exception that the Appellate Administrative Law Judge found Appellants' new application to be a direct attack on the original pooling order, rather than a collateral attack, as had been found by the Initial Administrative Law Judge. The Appellate Administrative Law Judge also determined that Appellants were barred by the doctrines of res judicata and estoppel by judgment. The Appellate Administrative Law Judge held:

> "Res judicata bars a second suit between the same parties on the same subject matter resolving the same issues between the parties or any issues that might have been raised by the parties. *Brown v. Briggs*, 292 P.2d 385 (Okla. 1956); *Federated Department Stores, Inc. v. Moitie*, 452

U.S. 394 (1981); *Lewis v. Aubrey*, 404 P.2d 1005 (Okla. 1965)."

The same arguments were made by Appellants on appeal before the Commission en banc. The Commission, after considering argument of counsel, issued Order No. 358995. The Commission, in its final order, adopted, by reference, the Initial Report of the Administrative Law Judge, as well as the recommendation of the Appellate Administrative Law Judge. (APP 52). The Commission, in concluding that Appellants' application should be denied, stated:

> "It is the opinion of the Commission that the Applicants have failed to establish any basis for vacating or modifying Order No. 260474. To do so would violate the vested rights of the Protestants." APP 52 – APP 53.

The Oklahoma Court of Appeals affirmed the Commission (APP 4) and the Oklahoma Supreme Court denied Petitioners' request for discretionary review. (APP 1).

ARGUMENTS AND AUTHORITIES

PROPOSITION I: NOTICE OF THE HEARING OUT OF WHICH ORDER NO. 260474 WAS ISSUED WAS NOT MISLEADING AND DID NOT DENY PETITIONERS DUE PROCESS.

These Respondents note at the outset of this proposition that Petitioners do not, and more importantly cannot, argue that they did not receive notice of the 1984 pooling

proceeding. Nothing more than this fact confirms that the notice standards set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) have been satisfied. That is, in *Mullane*, this Court said:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane*, 339 U.S. at 314, 94 L.Ed. at 873.

Here, Petitioners were apprised of the pendency of the action. Petitioners were afforded an opportunity to present their objections. Indeed, Petitioners were present at the hearing. Clearly, the notice relating to the 1984 pooling proceedings satisfied the requirements of *Mullane*.

Petitioners refer the Court to eight United States District Court cases for the proposition that " . . . notice issued by an administrative agency satisfies due process, unless the recipient can demonstrate that he or she was misled". These eight cases are cited by Appellants at Pages 24 and 25 of Petitioners' Brief. Review of those cases show that they are either not on point, or upon analysis, support the proposition that the notice received by the Petitioners was sufficient. *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044, 110 S.Ct. 839, 107 L.Ed.2d 835 (1990) related to notice of a hearing in connection with certain violations of cable television franchises. The notice was found to be sufficient. *Cosby v.*

Ward, 843 F.2d 967 (7th Cir. 1988), was a case where unemployment compensation claimants challenged Illinois' active work search requirements. The notice of the hearing was found to contain inadequate notice of the issues to be determined. Conversely, here, the parties, including Petitioners, were notified that the Applicant was requesting that "all of Section 23" be pooled. (See Petitioners' Brief at p. 8).

In *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358 (10th Cir. 1979), the Tenth Circuit held that a complaint containing an incorrect docket number and which failed to provide respondents with copies of the standards violated was valid. Specifically, the Tenth Circuit said:

> "As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient." *Savina*, 594 F.2d at 1365 (10th Cir. 1979)

Intercontinental Industries, Inc. v. American Stock Exchange, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842, 93 S.Ct. 41, 34 L.Ed.2d 81 (1972), involved a notice of hearing of a violation of stock exchange rules and a possible de-listing from the exchange. The notice of hearing was found to be adequate. *L.G. Balfour Co. v. Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971), related to a notice of hearing by the Federal Trade Commission on a complaint that respondents violated prohibitions against unfair methods of competition. The Seventh Circuit held:

> "There is no requirement that a complaint in an administrative proceedings enumerate precisely every event to which a hearing examiner may finally attach significance. The purpose of the

> administrative complaint is to give the responding party notice of the charges against him." *L.G. Balfour Co.*, 442 F.2d at 19 (7th Cir. 1971)

Cella v. United States, 208 F.2d 783 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016, 74 S.Ct. 864, 98 L.Ed. 1138 (1954), involved a notice to a livestock dealer of a hearing before a judicial officer of the United States Department of Agriculture to suspend the dealer's registration under the Packers and Stockyards Act. The dealer argued that the notice was defective in that it failed to state the dates when the acts took place. The Court, in holding that the notice was valid, said:

> "In an administrative proceeding it is only necessary that the one proceeded against be reasonably apprised of the issues and controversy, and any such notice is adequate in the absence of a showing that a party was misled." *Cella*, 208 F.2d at 789 (7th Cir. 1953).

In *Mayhew v. Cohen*, 604 F. Supp. 850 (E.D. Pa. 1984), recipients of federal or state welfare assistance challenged the process by which the state Department of Public Welfare recouped alleged benefit overpayments. *Id.* at 857. The series of letters which the state used to advise of the recoupment process failed to give adequate notice. Here, notice was undeniably given and Petitioners were present at the hearing.

Finally, *Doston v. Duffy*, 732 F. Supp. 857 (N.D. Ill. 1988), involved notices relating to procedures of the Department of Public Aid terminating or reducing benefits to dependent children when clients failed to cooperate with the agency in locating an absent parent. *Dotson* involved: (1) hearings without notice; or (2) hearings with

untimely notice. *Doston* also addressed specific federal rules or regulations relating to notice. Again, in this case, notice was undeniably given and Petitioners were present at the hearing. (See Petitioners' Brief at pages 7-8).

The United States Supreme Court case cited by Petitioners, *Peralta v. Heights Medical Center*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988) is clearly distinguishable. The issue in *Peralta* was whether a party was required to show that it had a meritorious defense in order to have a default judgment vacated. The Petitioner had never been given an opportunity to raise a defense, meritorious or otherwise. This Court determined that because Petitioner had never been afforded an opportunity to be heard, the notice requirements of *Mullane* had not been satisfied. *Peralta*, 485 U.S. at 84, 99 L.Ed.2d at 81.

Here, Petitioners not only received notice but were present at the hearing. Petitioners' argument that notice was inadequate, therefore, unavailing.

Petitioners' efforts to transform Policy Statement No. 45 into something that it is not should also be rejected. The notice in the 1984 pooling proceeding is quoted at pages 7-8 of Petitioners' Brief. It clearly stated that the Applicants sought to pool all of Section 23. It clearly apprised Petitioners of the pendency of the action and afforded them with an opportunity to present their objections. Policy Statement No. 45 was issued thirteen days after the hearing. It had nothing to do with notice. It was unrelated to the cause out to which the pooling order was issued. Petitioners simply made an election, which, with the benefits of hindsight, they wish they had not made. Petitioners were not denied due process.

PROPOSITION II: THE DOCTRINE OF RES JUDICATA BARS PETITIONERS' CLAIMS.

The same parties in the instant proceeding participated in *Inexco v. Corporation Commission*, 767 P.2d 404 (Okla. 1988), *cert. denied*, 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989). Petitioners are at most raising new arguments involving the same set of facts. Res judicata, therefore, bars Petitioners' claims. In *Inexco*, Petitioners argued that they should be allowed to participate in the increased density well which was subsequently drilled.

In this case, they make the same argument. It is settled that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. To this effect, in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), this Court said:

> "There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Federated Department Stores*, 452 U.S. at 398, 69 L.Ed.2d at 108-109.

See also, Braine v. Stroud, 385 P.2d 428, 431 (Okla. 1963) (A final judgment is conclusive between the parties as to all matters and issues which could have been litigated.) Again, Petitioners raised Policy Statement No. 45 in *Inexco*. However, assuming for purposes of argument only that they did not, it certainly cannot be said that Petitioners could not have argued their theory based on

Policy Statement No. 45. Clearly, Petitioners are barred from raising that theory by the doctrine of res judicata.

CONCLUSION

Petitioners have not been denied due process. Petitioners' claims are barred by the doctrine of res judicata. The Petition for Writ of Certiorari to the Oklahoma Court of Appeals should be denied.

Respectfully submitted,

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